REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 122 of 2003

UNI PLASTIC LIMITED…..……..…….…….....APPELLANT

VERSUS

GILBERT MULONGO WAFULA…… RESPONDENT

(An appeal from the judgment and decree of M/s Maina, Senior Resident Magistrate

delivered on 14th February, 2005 in Nairobi RMCC 5405 of 2001)

J U D G M E N T

1. This appeal arises from a judgment in a suit which was filed in the Chief Magistrate's Court at Nairobi by Gilbert Mulongo Wafula, hereinafter referred to as the respondent, against Uni-plastics Limited, hereinafter referred to as the appellant. The respondent, who was an employee of the appellant, claimed that he was injured during the course of his employment, as a result of the appellant's negligence and/or breach of contract.

2. The appellant admitted having employed the respondent, but maintained that the respondent was employed as a general worker and not a machine attendant. The appellant further denied being negligent, and contended that the accident was caused or substantially contributed to by the respondent's own negligence. The appellant also relied on the doctrines of *volenti non fit injuria* and *res ipsa loguitur*. By an oral amendment to the defence, the appellant contended that the respondent was fully compensated through an out of Court settlement whereby the appellant paid the respondent a sum of Kshs.10,000/= pursuant to which the respondent fully discharged the appellant from liability.

3. During the hearing before the lower Court, two witnesses testified in support of the respondent's case. These were the respondent and Dr. Cyprianus Okoth Okere (Dr. Okere). The respondent explained that on the material day, while he was on duty, he was pushing some materials on a trolley taking them to the ground floor from the upper floor. Although there was a lift, the respondent did not use the lift. The respondent was pushing the trolley in front of him, when the tyres of the trolley jammed and the trolley lost balance, hit the respondent and rolled over him. As a result the respondent was injured on the chest and abdomen. He was admitted at the Kenyatta National Hospital where he was treated and discharged. Dr. Okere testified that he examined the respondent on the 28th August, 2002. At the time of the examination the respondent complained of abdominal and chest pain. The abdomen was tender and had deep palpitations. Dr. Okere concluded that the respondent had suffered a severe abdominal injury. He prepared a medical report which he produced in evidence. Dr. Okere conceded that he relied on a medical report prepared by Dr. Wandugi to prepare his report.

4. The respondent blamed the appellant for the accident. He contended that had the trolley been serviced the accident would not have occurred. He denied having been paid any compensation. Under cross-examination, the respondent explained that the speed at which he was pushing the trolley was determined by the gradient and the supervisor. The respondent denied having been in a hurry or having skidded. He conceded having gone to the Royal Centre in Westlands on instructions of the appellant, but denied having been paid the sum of Kshs.10,000/=.

5. The appellant called two witnesses in support of its defence. These were Julius Muthike (Muthike) who was working for the appellant as a stores supervisor, and Tom Oduor (Oduor) a private investigator with Secupak Limited. Muthike explained that he assigned a group of workers to take some stores to the basement. The workers were to use trolleys to carry the goods. They were to use the lift from the upper floor to the basement. However, the plaintiff used a by-way to take the goods to the basement instead of the lift, as it was a short cut. Muthike testified that the respondent was not injured on the slope but was injured on the flat ground. He suspected that the respondent was pushing the trolley at a high speed. He maintained that the respondent was paid the sum of Kshs.10,000/= and that he signed a voucher for that amount. He blamed the respondent for the accident as the respondent failed to use the lift. Under cross-examination Muthike conceded that he did not witness the accident nor was he present when the respondent allegedly signed the discharge voucher.

6. Tom Oduor testified that he was assigned to investigate the accident involving the respondent on instructions from Geminia Insurance Company. He went to the appellant's premises and interviewed Muthike and one Benedict Mukunga, an employee of the appellant. He prepared a report which he produced in evidence. Under cross-examination, Oduor maintained that the respondent was pushing the trolley at a fast pace and was unable to control it at the basement. He concluded that the trolley must have hit a pillar to cause it to stop.

7. Counsel for the appellant and the respondent each filed written submissions in the lower Court urging the Court to find in favour of their client. In her judgment the trial Magistrate found that both the appellant and the respondent contributed to the accident – the appellant by neglecting to keep its equipment in a good state of repair and by failing to properly supervise its workers; and the respondent by failing to use the lift. She apportioned liability at 70% as against the appellant and 30% as against the respondent. She awarded damages of Kshs.150,000/= subject to the respondent's 30% contribution. She directed that any amount paid under the Workman's compensation Act was deductible. She also awarded costs of the suit and interest at Court rate to the respondent.

8. Being aggrieved by that judgment, the appellant has come to this Court citing four grounds of appeal as follows:

(i) The learned Magistrate erred in finding that the appellant was liable for the accident at 100% despite empirical evidence that his was clearly not so.

(ii) The learned Magistrate erred in finding that the appellant compensates the respondent in the sum of Kshs.106,000/= in general damages.

(iii) The learned Magistrate erred in the award of damages as it was not proportional to the injuries suffered. The plaintiff/respondent suffered minor injuries and as such the award of damages was excessive.

(iv) The learned Magistrate further erred in arriving at decision that was wholly against the weight of the evidence produced.

9. Mr. Anyoka who argued the appeal in favour of the appellant, drew the Court's attention to the evidence of Dr. Okere in which he expressed the view that the trolley must have been going uphill when it injured the respondent. Mr. Anyoka submitted that Dr. Okere's evidence contradicted the respondent's evidence that he was going downhill. Mr. Anyoka maintained that the trolley was a small trolley and that the respondent was the one to determine the ideal weight of goods carried on the trolley. He submitted

that the respondent must have been in a hurry as it was about 3p.m. when the respondent was about to sign off.

10. Mr. Anyoka further contended that the respondent was the author of his own misfortune as he was not careful. He therefore urged the Court to allow the appeal on the issue of liability. With regard to quantum Mr. Anyoka submitted that the respondent was paid a sum of Kshs.10,000/= under the Workman's Compensation Act and that amount was not reduced in the final award.

11. Mr. Oluoch who appeared for the respondent in the appeal, submitted that the appeal was totally lacking in merit. He contended that the appellant had misapprehended the judgment of the trial Magistrate, as the trial Magistrate did not apportion liability at 100% against the appellant, but apportioned liability at 70%, the respondent bearing 30% contribution. Mr. Oluoch maintained that the respondent's evidence as to how the accident happened was not challenged by the appellant. Mr. Oluoch pointed out that the defence witness conceded that he did not witness the accident.

12. Mr. Oluoch further submitted that the investigation report which was produced was based on hearsay. He pointed out that Muthike conceded that the employees were not using the lift but were using the by-way, and therefore there was a failure of supervision on the part of the appellant to ensure that the employees use the lift as instructed. With regard to the discharge, Mr. Oluoch submitted that the respondent denied having signed the discharge voucher or having received the sum of Kshs.10,000/=. He maintained that there was no evidence to support the appellant's alleged payment as Muthike denied having been present when the respondent was paid. Mr. Oluoch therefore submitted that the trial Magistrate was right in not taking into account the alleged payment. With regard to Dr. Okere's evidence regarding how the accident occurred, Mr. Oluoch pointed out that the same had no probative value as Dr. Okere was only expressing an opinion. Mr. Oluoch therefore urged the Court to dismiss the appeal.

13. I have carefully reconsidered and evaluated all the evidence which was adduced before the trial Magistrate. I have also considered the submissions which were made. The respondent's claim was grounded on breach of contract and negligence on the part of the defendant, particulars of which were given as follows:

(a) Failing to provide a safe system of work.

(b) Providing the plaintiff with defective machines to work with.

(c) Failing to properly maintain its machines and appliances.

(d) Failing to warn the plaintiff of the defects in the machines with which he was required to work.

(e) Exposing the plaintiff to the risk of injury

(f) Failing to provide adequate supervision.

14. In his evidence the respondent explained that he was pushing a trolley carrying some materials from an upper floor to the store which was on the ground floor. In his evidence in chief the respondent claimed that there were no stairs. However under cross examination the respondent conceded that there was a lift which was what they usually used. The respondent explained that on that particular day, he did not use the lift because he was not asked to do so. That explanation contradicts the respondent's contention that the appellant failed to provide a safe system of work. Indeed the appellant's witness Muthike confirmed that there was a lift, but that contrary to specific instructions respondent opted to use a by-way to take the goods to the basement as the by-way was a shortcut.

15. The respondent must therefore take responsibility for having opted to use the shortcut instead of the more secure route of using a lift. The respondent cannot shift the blame onto the appellant by claiming that the appellant failed to effectively supervise the respondent to ensure that the respondent complied with the given instructions. That would be absurd, as it would be an attempt by the respondent to rely on

his own negligence to lay blame on the appellant.

16. Further, the respondent explained in his evidence in chief that he was pushing the trolley going down when the tyres of the trolley jammed and the trolley lost balance, hit the respondent, then rolled over him. The respondent blamed the appellant for failing to service the trolley. In cross-examination, the respondent explained that he was pushing the trolley in front of him. Now I fail to understand how the trolley which the respondent was pushing ahead of him lost balance then moved backwards to hit the respondent who was behind the trolley, and rolled over him. The respondent's evidence is even more puzzling given that the route followed was not straight but was sloping downwards and the trolley was therefore unlikely to roll backwards.

17. There was no evidence at all in support of the respondent's allegation that the trolley was defective or that it was not properly maintained. In his evidence in chief the respondent stated that the trolley jammed and then lost balance. The respondent did not explain what exactly caused the trolley to jam. It was only in cross examination that the respondent explained that after the trolley jammed, its wheels came off. The Court cannot just assume that the trolley jammed because of poor maintenance. That was a matter which had to be established by the respondent who was alleging the fact. The trial Magistrate's finding that the appellant neglected to keep its equipment in a good state of repairs was therefore unsupported by evidence. The possibility that the accident may have been caused by factors other than the state of the trolley was not ruled out.

18. I find therefore that the respondent failed to prove any negligence or breach of duty on the part of the appellant. At best the respondent was only entitled to compensation for his injuries under the Workman's Compensation Act. An attempt was made by the appellant to show that the respondent's claim was compromised through an out of Court settlement under the Workman's Compensation Act. However, the respondent denied having received any payment. The appellant failed to call any person who witnessed the payment to the respondent, and therefore there was no evidence to support the appellant's allegation in that regard.

19. The upshot of the above is that the respondent failed to prove his case against the appellant. The trial Magistrate's finding cannot therefore be supported. Accordingly, I allow the appeal; set aside the judgment of the trial Magistrate and substitute thereof an order dismissing the respondent's suit.

Orders accordingly.

Dated and delivered this 17th day of September, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Advocate for the Appellant served, absent

Oluoch for the respondent